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No. 362

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

WYBRANT SYSTEM PRODUCTS CORPORATION, ET AL.,
PETITIONERS

v.

FEDERAL TRADE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 1959

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement	3
Reasons for Granting the Writ	5
Conclusion	13
Appendix A	14
Appendix B	16
Appendix C	17

CITATIONS

CASES:

Bene & Sons v. *Federal Trade Commission*, 2 Cir. 1924, 299 F. 468, 471	10
Buchwalter v. *Federal Trade Commission*, 235 F.2d 344, 346 (2d Cir. 1956)	11
City of Dothan v. *Hardy*, 237 Ala. 603, 188 So. 264 (1939)	11
Dolcin Corp. v. *Federal Trade Commission*, 219 F.2d 742, 748-49 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 981	9, 10, 12
Emerson Drug Co., Dkt. No. 4854 (1949)	12
Federal Trade Commission v. *Cement Institute*, 333 U.S. 683, 705-06 (1948)	11
Federal Trade Commission v. *Liggett and Myers Tobacco Co.*, 108 F.Supp. 573 (S.D. N.Y. 1952), *aff'd per curiam* 203 F.2d 955 (2d Cir. 1953)	6
Interstate Commerce Commission v. *Baird*, 1904, 194 U.S. 25, 44, 24 S. Ct. 563, 48 L. Ed. 860	10
Matter of Gilbert S. Bishop, FTC Dkt. 6554 (May 1958)	12
Reilly v. *Pinkus*, 338 U.S. 269 (1949)	10

Page

Ruth v. Fenchel, 21 N.J. 171, 176, 121 A.2d 373, 375 (1956) 12
Stoudenmeier v. Williamson, 29 Ala. 558 (1857) 11

STATUTES:

Sherman Act, Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. 1, *et seq.*:
Sec. 5 6
Sec. 12 ..... 2, 3, 4, 5, 6, 8, 9
Administrative Procedure Act, § 1006(c) 10

MISCELLANEOUS:

The American Law Institute, Model Code of Evidence, Rule 529 11
Atty. Gen. Manual on the Adm. Proc. Act 11
Cong. Rec. pp. 567, 568, 571, Jan. 12, 1938 ..... 7, 8
Dana, *Admission of Learned Treatises in Evidence*, Wis. L. Rev. 455, 462 (1945) 11
2 Davis, Administrative Law, Ch. 14, at pp. 291, 335-37 (1958) 11
H. Rep. No. 1613, 75th Cong., 1st Sess 6
H. Rep. No. 1774, 75th Cong., 3d Sess. 7
2 Morgan, Law of Evidence, Amer. Law Inst. 319-20 (1957) 11
McCormick, *Hearsay*, 10 Rutgers L. Rev. 620, 628 (1956) 11
McCormick, Law of Evidence 620-21 (1954) 11
McCormick, *Some High Lights of the Uniform Evidence Rules*, 33 Tex. L. Rev. 559, 567-68 (1955) .. 11
The Report of the New Jersey Committee of the Supreme Court on the Revision of the Law of Evidence 12
The Uniform Rules of Evidence, Rule 63 (31) (1953) 11
6 Wigmore, Evidence (3d ed. 1940) 11

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No.

WYBRANT SYSTEM PRODUCTS CORPORATION, ET AL,
PETITIONERS

v.

FEDERAL TRADE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decision of the Court of Appeals for the Second Circuit entered on May 5, 1959, which affirmed the opinion and order of the Federal Trade Commission against petitioners.

OPINIONS BELOW

Neither the opinion of the Court of Appeals (Appendix A, *infra*, pp. 14-15) nor the decision and order

of the Federal Trade Commission (Appendix C, *infra*, pp. 17-24) has yet been reported.

JURISDICTION

The decision of the Court of Appeals was entered on May 5, 1959, and a timely petition for rehearing was denied on June 1, 1959 (Appendix B, *infra*, p. 16). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals affirming the order of the Federal Trade Commission should be set aside for lack of jurisdiction because the petitioners' advertisements relate solely to a treatment which is not covered by Section 12 of the Federal Trade Commission Act.

2. Whether the Court of Appeals erroneously affirmed a ruling of the Federal Trade Commission that medical treatises are inadmissible as evidence in an administrative proceeding.

STATUTE INVOLVED

This proceeding was brought under Section 12 of the Federal Trade Commission Act (15 U.S.C. § 52) which provides in pertinent part:

> Sec. 12. (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—
>
> (1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

* * *

STATEMENT

Petitioners are engaged in the business of administering hair and scalp treatments in New York, New York. On November 21, 1955, the Federal Trade Commission issued a complaint charging, *inter alia*, that the petitioners, in violation of Section 12 of the Federal Trade Commission Act, disseminated advertisements which represented that through the use of their preparations and treatments "baldness and excessive hair loss will be prevented" and that "new hair will be grown on bald areas in the majority of cases" (R. 7).[1]

Before the hearing examiner, both sides presented extensive evidence on these charges of the complaint, including the testimony of medical and consumer witnesses. Petitioners also proffered as evidence excerpts from four leading medical treatises. The hearing examiner, however, ruled that such evidence was inadmissible in an administrative proceeding (R. 230-33).

At the close of the hearings the examiner issued an initial decision which found that the use of petitioners' "preparations regardless of their formula and their treatment will not prevent baldness or excessive hair fall or cause new hair to grow on bald areas in cases of male pattern baldness" (R. 33).

[1] The symbol "R" is used to refer to the printed record below; "CX" refers to the exhibits introduced by Commission counsel.

On review, the full Commission, without discussion, adopted the findings of the hearing examiner (R. 38-44). On the question of the admissibility of medical treatises, the Commission affirmed the ruling of the hearing examiner (*infra*, pp. 20-21).

Petitioners also urged before the hearing examiner and the Commission that Section 12 of the Federal Trade Commission Act, which relates to false advertising involving four named products, does not confer jurisdiction over advertisements dealing solely with "treatments" such as petitioners'. The evidence at the hearings disclosed that none of petitioners' advertisements offered for sale, either directly or indirectly, any preparations or "cosmetics" (CX 1-6, 10-13, 39). All of the advertisements, as the hearing examiner found, related solely and exclusively to petitioners' hair and scalp treatments (R. 25-26).[2] Moreover, the clients of petitioners were not required to purchase any preparations as a part of a course of treatments (CX 4, 39). Occasional sales of products were made to clients solely as an accommodation when treatments were interrupted (i.e., a vacation or trip) or discontinued (e.g., R. 153). The only specific evidence introduced by Commission counsel of such sales of preparations (i.e., lotion and shampoo) were out-of-state sales in the amounts of $525.00 in 1955; $427.72 in 1954; and $385.75 in 1953 (R. 48). Since petitioners' total business for these years was $487,843.17 for 1955, $405,415.36 for 1954, and $242,219.96 for 1953, the annual sales of such preparations never exceeded two-tenths of 1% of petitioners' gross sales (R. 47-48).

[2] The treatment consists of various forms of massage and other methods of physiotherapy. For a full description of an ordinary 45 minute treatment, see R. 50-54. Clients neither purchase nor obtain any products as part of a course of treatment.

On the basis of the above evidence, both sides presented full written and oral argument before the Commission on the question of whether Section 12 covered a treatment such as petitioners'. However, the Commission in its opinion failed even to mention the issue (*infra*, pp. 17-24).

On appeal to the Court of Appeals, these two issues—the coverage of Section 12 and the admissibility of selections from medical treatises—were extensively briefed and argued by both parties. On May 5, 1955, the Court of Appeals for the Second Circuit issued a one-paragraph *per curiam* opinion affirming the cease and desist order issued by the Federal Trade Commission (*infra*, pp. 14-15).

REASONS FOR GRANTING THE WRIT

This petition presents two important matters of federal law and procedure: (1) whether Section 12 confers jurisdiction over advertisements involving "services" or "treatments" and (2) whether scientific or medical writings are admissible as evidence in an administrative proceeding.

1. Jurisdiction Over "Services" or "Treatments" Under Section 12

This case presents an important public question involving the coverage of Section 12 of the Federal Trade Commission Act. That section makes it unlawful to disseminate any false advertisements "for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices or cosmetics." Following this statutory language, the complaint in this case charged that petitioners "disseminated and caused the dissemination of

advertisements concerning their said preparations . . . for the purpose of inducing and which were likely to induce, directly or indirectly, the sale of their said preparations" (R. 4) (Emphasis added).

Commission counsel did not present any evidence in support of the above jurisdictional allegation. The simple fact is, as the hearing examiner found, that petitioners' advertisements relate solely to a method of treatment (R. 25-26). Nevertheless, the examiner held that jurisdiction attaches under Section 12 (R. 23-24). On appeals to the full Commission and the Court of Appeals, both sides extensively briefed and argued the validity of the examiner's jurisdictional ruling, but neither opinion considered the jurisdictional question.

Section 12, as a part of the Wheeler-Lea amendment of 1938, was designed to increase the remedies available to the Federal Trade Commission under Section 5 in order to deal more adequately with the evils resulting from false advertising of a limited group of commodities—food, drugs, devices and cosmetics (H. Rep. No. 1613, 75th Cong., 1st Sess.). The terms "food," "drug," "device," and "cosmetic" are very carefully defined in Section 15. It is plain from a reading of these definitions that these four "commodities" cannot be stretched to include a "service" or "treatment."[3]

Indeed, if there is any doubt on this point, it is conclusively settled by the legislative history. During the

[3] The Commission tried but failed to extend Section 12 to cover cigarettes by calling them a "drug." *Federal Trade Commission* v. *Liggett and Myers Tobacco Co.*, 108 F. Supp. 573 (S.D. N.Y. 1952), *aff'd per curiam* 203 F. 2d 955 (2d Cir. 1953).

House debates on the Wheeler-Lea bill, Congressman Phillips pointed out that the bill did not "cover advertising coming from quack doctors, quack medical schools, and quack medical *treatments*" (Cong. Rec., p. 567, Jan. 12, 1938). Believing this to be an omission, Congressman Phillips then introduced an amendment to extend the coverage of the bill to "medical *services*" which were defined as "all medical *treatments*, or cures, so-called, or surgery, or schooling in medical practices, or *treatments*, or surgery."

Congressman Lea, the co-sponsor of the Wheeler-Lea bill, strongly opposed the Phillips amendment. He said:

> "Mr. Chairman, in the first place this amendment would open and broaden the field of the application of this legislation to an extent that nobody is able to say without consideration. We have had no hearings, no opportunity for those who might be opposed to it to present and define to the committee and to the Congress how far reaching it might be. * * * Under the circumstances, I think we had better let the bill stand as written" (Cong. Rec., pp. 567-68, Jan. 12, 1938).[4]

---

[4] Congressman Lea reassured Congressman Phillips that false advertisements involving medical treatments could be prosecuted under the "general jurisdiction" of the Commission under Section 5 and the state statutes against false representation *(Ibid.)*.

Congressman Lea added that "the Phillips Amendment will be one of those amendments to which I can assure my friend the conference committee will give careful consideration, not in an unfriendly way, but to try to give it a just appraisal" *(Ibid.)*. (No action was taken by the conference committee. H. Rep. No. 1774, 75th Cong. 3d Sess.)

See also remarks of Senator Wheeler, the other co-sponsor of the Wheeler-Lea bill, at p. 571, Cong. Rec., Jan. 12, 1938.

The House accordingly rejected the proposed amendment (*Ibid.*). Yet, despite the clear statement of coverage in the statutory provision and despite the explicit and conclusive legislative history on the matter, the Commission still insists that it has jurisdiction over advertisements which relate solely to a treatment. In this proceeding the hearing examiner's findings acknowledged that petitioners never advertised the sale of preparations. The examiner further conceded that the only evidence in the record relating to the sale of preparations was the out-of-state sales for 1953-55 (R. 14-17, 23). In 1955, these sales of preparations amounted to $524 or one-tenth of one percent, or $1.00 out of every $1,000 of petitioners' annual receipts for that year. Even these *de minimis* sales provide no basis for jurisdiction under Section 12 since, as the record shows, they were not in any way related to petitioners' advertisements.

The Commission apparently brought this proceeding under Section 12 in the mistaken belief that petitioners disseminated "advertisements concerning their said preparations" (FTC Complaint ¶4, R. 4). At the hearings, it was shown that petitioners' advertisements related solely to the treatment. Yet the Commission persisted in its contention that it had jurisdiction over petitioners' advertisements of "treatments" under Section 12. However, neither the court below nor the Commission offered any explanation for the asserted jurisdiction over treatments, even though the issue was fully briefed and argued before both tribunals. Certainly nothing in the statutory language, policy or legislative history of Section 12 supports such an interpretation. Plainly the claim of jurisdiction approved by the decision below raises a funda-

mental question of the application of Section 13 which should be settled by this Court. This is the only way to eliminate the confusion which now exists concerning the scope of regulatory authority of this vital part of the basic statute of the Federal Trade Commission.

2. The Admissibility of Treatises as Evidence in an Administrative Proceeding

Petitioners introduced during the hearings excerpts from four standard medical treatises. These selections directly related to the central issues involved in the proceeding. The hearing examiner, however, ruled that the four exhibits were inadmissible, since the writers were not available for cross-examination (R. 231-33). On appeal, both the Commission and the Court of Appeals for the Second Circuit affirmed this ruling.

These decisions below squarely conflict with the recent ruling of the Court of Appeals for the District of Columbia in *Dolcin Corp.* v. *Federal Trade Commission*, 219 F.2d 742, 748-49 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 981.

In *Dolcin*, the Federal Trade Commission's complaint charged that defendants had engaged in unfair and deceptive acts by disseminating false and misleading advertisements in connection with the sale of a drug product ("Dolcin") as a remedy for arthritis and rheumatism. The Commission, after extensive hearings, found that none of the ingredients of Dolcin, other than aspirin, had any value in relieving arthritic or rheumatic conditions. During the course of the hearings, the examiner refused to admit in evidence certain scientific writings from articles and treatises by leading medical authorities which were offered by the defendants. On appeal, the Court of Appeals for

the District of Columbia unanimously rejected the examiner's ruling. The Court, though it recognized that "scientific writings are clearly hearsay" (p. 748), said:

> "We think authoritative scientific writings can—and should—be freely used by administrative agencies. Congress has said that 'Any oral or documentary evidence may be received * * *.' Administrative Procedure Act., § 1006(c); see also Interstate Commerce Commission v. Baird, 1904, 194 U.S. 25, 44, 24 S. Ct. 563, 48 L. Ed. 860, Bene & Sons v. Federal Trade Commission, 2 Cir. 1924, 299 F. 468, 471. Furthermore, the rationale of Reilly v. Pinkus points toward use of scientific texts in adversary proceedings." [footnote omitted] [p. 749]

In support of its position, the Court of Appeals pointed out that evidence from medical treatises "is at least as reliable as the ordinary expert's testimony from the stand. It usually is characterized by precise formulation and documentation. Moreover, the ordinary expert when testifying most often relies in whole or in part upon the written works of other experts" (p. 740).[5]

The unanimous opinion of the Court of Appeals in *Dolcin* is certainly unimpeachable precedent for the Federal Trade Commission. Moreover, the *Dolcin* ruling and the rationale of this Court's opinion in *Reilly* v. *Pinkus*, 338 U.S. 269 (1949), are supported by the foremost authorities on evidence law. Wigmore, as an example, fully endorses the admissibility of medical

[5] Since the excluded writings were "not vital" and concerned only "subjects of marginal significance" to the case, the court held that "substantial justice" did not require reversal under the circumstances (p. 749).

treatises and books as evidence of the truth contained therein.[6] The rule of admissibility is also favored by other leading authorities such as Professors Edmund Morgan,[7] Charles McCormick[8] and Kenneth Culp Davis,[9] as well as by the leaders in the field of evidence who drafted the *Model Code*,[10] the *Uniform Rules*,[11] and

[6] In Sections 1690-1700 of his monumental work, Wigmore gives a full statement of the reasons why scientific treatises should be admitted as evidence (6 Wigmore, Evidence (3d ed. 1940)). He points out that treatises fulfill the requirements of necessity and trustworthiness, the two tests for determining whether an exception should be made for hearsay evidence. Certainly the treatises offered by petitioners were necessary and trustworthy evidence. See statements by Commission's medical witnesses (R. 63-64, 77-78, 82, 86-87, 94).

Certainly if treatises are admissible in judicial proceedings, as already held (see *City of Dothan* v. *Hardy*, 237 Ala. 603, 188 So. 264 (1939); *Stoudenmeier* v. *Williamson*, 29 Ala. 558 (1857)), then there is no basis either in policy or logic for excluding such evidence in administrative hearings. For as this Court has said, "administrative agencies like the Federal Trade Commission have never been restricted by the rigid rules of evidence." *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 705-06 (1948); see also *Buchwalter* v. *Federal Trade Commission*, 235 F. 2d 344, 346 (2d Cir. 1956); *Attorney General's Manual on the Administrative Procedure Act* (see p. 76, discussing § 7(c) of the APA).

[7] 2 Morgan, Law of Evidence, American Law Institute, 319-20 (1957).

[8] McCormick, Law of Evidence 620-21 (1954); McCormick, *Hearsay*, 10 Rutgers L. Rev. 620, 628 (1956); McCormick, *Some High Lights of the Uniform Evidence Rules*, 33 Tex. L. Rev. 559, 567-68 (1955); see also Dana, *Admission of Learned Treatises in Evidence*, Wis. L. Rev. 455, 462 (1945).

[9] 2 Davis, Administrative Law, Ch. 14, at pp. 291, 335-37 (1958).

[10] The American Law Institute, Model Code of Evidence, Rule 529.

[11] The Uniform Rules of Evidence, Rule 63 (31) (1953).

The Report of the New Jersey Committee of the Supreme Court on the Revision of the Law of Evidence.[12]

Despite the specific directive of the *Dolcin* court and the views of the best evidence authorities, the Federal Trade Commission still persists in following its old, pre-*Dolcin* rule that authoritative medical writings are inadmissible as evidence.[13] In another recent opinion, the Federal Trade Commission states that "the Commission has consistently followed the rule" that medical books and treatises are not admissible to prove statements therein contained. *In the Matter of Gilbert S. Bishop*, FTC Docket No. 6554 (May 1958).[13] Thus, it is clear that the Federal Trade Commission does not consider the *Dolcin* decision binding on its actions. Judicial review is, of course, meaningless if agencies may blithely ignore the decisions of the courts of appeals in the review of administrative action.

To allow the decision below to stand would not only sanction the Commission's open defiance of the reviewing courts, but it would further allow the Commission to perpetuate an unsound exclusionary rule of evidence—a rule rejected by the courts and the outstanding authorities on evidence law.

[12] Report of May 25, 1955. *But see Ruth v. Fenchel*, 21 N.J. 171, 176, 121 A. 2d 373, 375 (1956).

[13] Commission counsel below urged throughout this proceeding that the Commission adopt an exclusionary rule for scientific writings, relying on the pre-*Dolcin* FTC case, *Emerson Drug Co.*, Dkt. No. 4854 (1949).

CONCLUSION

The decision below is in conflict with applicable decisions of this Court and another court of appeals, and it presents questions of general importance in the administration of the Federal Trade Commission Act. It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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Attorneys for Petitioners

August 1959.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 268—October Term, 1958.

(Argued April 17, 1959 Decided May 5, 1959.)

Docket No. 25302

WYBRANT SYSTEM PRODUCTS CORPORATION *et al.*, *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

Before: CLARK, *Chief Judge*, and SWAN and MOORE, *Circuit Judges*.

On petition to review an order of the Federal Trade Commission.

Petitioners seek review and the setting aside of an order directing them to cease and desist from certain advertising practices.

EDWARD F. HOWREY, of Howrey & Simon, Washington, D. C. (John Bodner, Jr., of Howrey & Simon, Washington, D. C., on the brief), *for petitioners*.

FRANCIS C. MAYER, Atty., Federal Trade Commission, Washington, D. C. (Earl W. Kintner, Gen. Counsel, and James E. Corkey, Asst. Gen. Counsel, Federal Trade Commission, Washington, D. C., on the brief), *for respondent*.

PER CURIAM:

Petitioners' advertisements were placed in newspapers with interstate circulation; and though designed primarily to sell their hair and scalp treatments, the material clearly was "likely to induce * * * indirectly the purchase of" the preparations that they also sold in substantial quantities for home use.[1] This is sufficient to establish the Commission's jurisdiction under §12(a)(1) of the Federal Trade Commission Act, 15 U. S. C. A. §52(a)(1). *Mueller* v. *United States*, 5 Cir., 262 F. 2d 443. The firm testimony of the Commission's several expert witnesses that petitioners' preparations and treatments cannot cure male pattern baldness provides ample basis for the Trial Examiner's conclusion that the advertisements were false. And since these witnesses freely conceded that some authorities had expressed somewhat contrary views, we do not think the Trial Examiner's refusal to receive in evidence the medical treatises that petitioners offered constituted reversible error. See *Dolcin Corp.* v. *F. T. C.*, D. C. Cir., 219 F. 2d 742, 747-749, certiorari denied 348 U. S. 981.

Affirmed.

[1] Neither the Commission nor the Trial Examiner determined whether the use of preparations in connection with an office treatment constitutes a sale under §12 of the Federal Trade Commission Act, 15 U. S. C. §52. We construe the Commission's order—directed at advertisements by petitioners "in connection with the offering for sale, sale or distribution" of their preparations—to be similarly limited.

APPENDIX B

Order Denying Rehearing

Before CLARK, Chief Judge, and SWAN and MOORE, Circuit Judges.

On Petition for Rehearing.

John Bodner, Jr., of Howrey & Simon, Washington, D. C., for petitioners.

PER CURIAM.

Petition for rehearing denied.

C.E.C.

T.W.S.

L.P.M.

U.S.C.J.J.

June 1, 1959

APPENDIX C

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

John W. Gwynne, Chairman
Robert T. Secrest
Sigurd Anderson
William C. Kern
Edward T. Tait

Docket No. 6472

In the Matter of
WYBRANT SYSTEM PRODUCTS CORPORATION,
a corporation, et al.

Opinion of the Commission

By Tait, Commissioner:

The complaint, as amended, charges respondents, by its language, with violating Sections 12(a)(1) and 12(a)(2) of the Federal Trade Commission Act through disseminating, or causing to be disseminated, false advertisements.[1] The advertising claims involved include those which represent that respondents' preparations and treatments will prevent baldness and grow hair. The hearing examiner in an initial decision filed September 30, 1957, held that the allegations of the complaint with several excep-

[1] Sec. 12(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

tions not involved in the appeals) were sustained by the evidence, and ordered respondents, except the corporate respondent, to cease and desist the advertising found to be unlawful. Counsel for respondents and counsel in support of the complaint have filed cross-appeals.

The respondents are Wybrant System Products Corporation, a corporation, and Adel Wybrants, William W. Wybrants and Wade M. Wybrants. Adel Wybrants is the mother of William and Wade. The three Wybrants are named in the complaint individually and as officers of the said corporation and also as copartners, trading and doing business as "The Wybrant System." This partnership and the corporation both have their principal place of business at 353 W. 54th Street, New York, New York. The individual respondents control the stock of the corporation and direct and control its policies and practices. Six branch offices or treatment parlors are maintained by The Wybrant System in New York City where hair and scalp treatments are given.

The advertisements involved in this proceeding were published under the name "The Wybrant System" and appeared in two New York papers with interstate distribution, the Mirror and the News. The out-of-state circulation of these papers was found to be substantial. The record shows some distribution by mail of the editions of the papers carrying respondents' advertising. For instance, there is evidence of the circulation of at least 225 copies of these editions by mail. This advertising represents directly and by implication that the use of respondents' preparations and treatment will prevent excessive hair fall and baldness and will cause new hair to grow in a majority of cases.

The corporate respondent bottles and sells shampoos and lotions to persons who have received The Wybrant System hair and scalp treatments. These are the same preparations or some of the same preparations that are used for

the treatments. Sales of such preparations, found to be cosmetics within the intent and meaning of the Federal Trade Commission Act, include sales made outside of the State of New York.

Respondents' Appeal

One of the principal contentions of the respondents is that there has been a failure to prove the jurisdictional requirement of interstate commerce under Section 12. In arguing that there has been no showing the advertisements were disseminated in commerce for the purpose or with the likelihood of inducing a purchase within the meaning of Section 12, respondents appear to be relying largely upon their position that the advertisements relate solely to a treatment which, as such, is not covered by the statute, and which was not advertised to sell the preparations.

The record, we believe, contains sufficient evidence to satisfy the jurisdictional requirement not only of Section 12(a)(1), but also of Section 12(a)(2). Respondents advertised in newspapers with interstate distribution. Respondent corporation sold preparations to purchasers in interstate commerce. The testimony of many witnesses shows that as a direct result of the advertisements, prospective clients were induced to call at an office of The Wybrant System for treatment of the hair and scalp. It is also shown by the testimony that such persons after becoming clients purchased respondents' preparations for home use. The preparations were in fact sold only to clients or former clients. It is apparent that purchases were induced indirectly as a result of the advertising, regardless of whether the advertisements mention the preparations. From such showing it follows that the minimum statutory requirement of a likelihood of the purchase of preparations is met. Under 12(a)(1), there is here shown the dissemination of advertisements in interstate commerce which were at least "likely to induce, directly or indirectly, the purchase of

. . . cosmetics." Under 12(a)(2), there is shown the dissemination of advertisements which were at least "likely to induce, directly or indirectly, the purchase in commerce of . . . cosmetics."

It is also urged that counsel supporting the complaint failed to prove that respondents' advertisements contain any false representations and that the examiner erroneously evaluated the evidence. What the examiner essentially found was that the weight of the evidence supports a conclusion that the use of respondents' preparations and their treatment will not prevent baldness or excessive hair fall or cause new hair to grow in cases of male pattern baldness. In so finding, it appears that he carefully considered all the evidence, including the testimony of expert medical witnesses for and against the allegations of the complaint. It is our opinion that he properly weighed this evidence and that his findings in respect thereto are fully supported by the record.

Finally, on their appeal respondents assert that the examiner erred in ruling that passages from medical treatises were inadmissible as evidence. Respondents offered as evidence four excerpts from books on dermatology, described by them as written by well-recognized authorities. The examiner refused to admit the excerpts because the authors were not present for cross-examination. Respondents argue that this ruling conflicts with the holding in *Dolcin Corporation, et al.* v. *Federal Trade Commission*, 219 F. 2d 742 (1954), cert. denied 75 S. Ct. 571 (1955). The Commission does not so understand the Dolcin decision. The court there stated that:

> "When used to prove the truth of their contents scientific writings are clearly hearsay and are rejected as judicial evidence in all but a few jurisdictions."

It went on to say that cogent arguments can be made in favor of their use, but recognized the difficulty under the

hearsay rule. "Yet that objection," the court said, "may be largely obviated by requiring the introduction of the articles through experts in the field who will, themselves, be subject to cross-examination." No such procedure was followed herein. Moreover, not only did the court in *Dolcin* note that the examiner should have a certain broad discretion in this connection, it did not reverse the decision because of the exclusion of the scientific writings. It stated that it would do this only where substantial justice so requires and that it would hesitate in most cases to say that a rule almost universal in the courts would, in an administrative proceeding, deny the parties substantial justice. Under the circumstances, we cannot find that the examiner committed error here in refusing to admit the scientific writings.

Appeal of Counsel Supporting the Complaint

Counsel first takes exception to the examiner's failure to find that the use of respondents' preparations during the course of a Wybrant treatment involves a sale and a purchase of such preparations. This is a distinct question from that relating to the sale of preparations in bottles for home use. It appears that the treatment consists not only of applying preparations to the hair and scalp but some additional service as well, such as brushing and massaging. The issue here raised is one of fact which can be resolved only upon consideration of all relevant circumstances. It is not determinative of the question that some preparations are used in the giving of treatments and that such are necessary to the sought-after results. Rather, we believe the answer lies in the essential character of the transaction: that is, does it consist mainly of a transfer of goods or is it basically the rendering of a service in which the use of preparations is purely incidental thereto? In resolving such a question, factors to be considered would include the following:

(a) The significance of the preparations in the over-all performance with reference to purposes and effects;

(b) The percentage of the monetary value of the preparations used to the total cost of the entire treatment to the client;

(c) The importance of the skill of the operator giving the treatment compared to the importance of the functions of the preparations; and

(d) The necessity for taking office treatments as the only way to obtain desired preparations, when such are considered by potential purchasers to be efficacious in themselves and apart from the treatments.

Because of an insufficiency in the record, we make no ruling as to whether the use of preparations in connection with an office treatment may or may not constitute a sale; the holding here is simply that the evidence is not such as to permit a decision on the question one way or the other. In the matter of *Gilbert S. Bishop, d/b/a Bishop Hair Experts*, Docket No. 6554 (May 1958), it was not necessary to decide any such question since preparations were sold in bottles for home use to clients in connection with visits for office treatments.

It is also argued that the examiner should not have limited his findings and order with respect to hair growing claims to bald areas alone. This point is well taken since, as the record clearly shows, male pattern baldness is a condition in which the hair follicles gradually atrophy and disappear. In the earlier stages there may be a thinning of the hair on the scalp, but no bald areas. The weight of the evidence supports a finding and conclusion that not at any stage of male pattern baldness, whether or not there is a bald area, will respondents' preparations and treatment cause the growth of new hair.

With respect to the order it is urged that respondents should be required to disclose in connection with claims for the prevention of baldness and the growth of hair that their preparations will have no value in the "great majority" of cases rather than merely the "majority" of cases. We believe the record showing of estimates of male pattern baldness as constituting from 75% to 95% of the cases, which was found to constitute the great majority, clearly justifies a requirement of disclosure that such is the great majority.

In further connection with the order, it is counsel's contention that the examiner should have additionally proscribed dissemination by the United States mail. We agree. Since some distribution by mail of the papers carrying respondents' advertising is shown by the evidence, the prohibitions of the order should include dissemination by this means.

Counsel's final contention is that the examiner improperly dismissed the complaint as to the respondent Wybrant System Products Corporation. The examiner found, improperly, we believe, that the corporate respondent does no advertising. In this instance we have a partnership composed of the individual respondents and a corporation in which the individual respondents are the officers and controlling stockholders. It is well settled that a corporation can act only through its agents. In view of the circumstances in this record, it cannot be assumed that when the officers of the corporation acted, they were acting solely as copartners in a distinct and separate enterprise.

All the sales of the preparations here involved for home use were made to clients of The Wybrant System. Thus, it is clear that to the extent that the advertising attracted clients, it was such as to result in benefits to the corporation. Moreover, the testimony is to the effect that in the regular course of business, orders for preparations (although not every such order) are taken by employees of

the partnership and turned over to the corporation. It is clear, therefore, that the corporation and the partnership were not acting independently so far as there existed a program of advertising which brought in clients and so far as such clients thereafter became purchasers from the corporation. The effect was an adoption by the corporation of the advertising of the partnership. In our opinion, these factors in conjunction with the close identification in ownership and control as between the partnership and the corporation in this case justify a conclusion that the practices herein involved of the copartners were in fact the practices of the corporation, the latter acting through its agents, the officers. Thus, the corporation is also responsible for the advertising and should be named in the order.

Respondents' appeal is denied and the appeal of counsel supporting the complaint is granted in part and denied in part as indicated herein. The findings, conclusions, and order in the initial decision are modified to conform with this opinion.

May 29, 1958.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	4
Conclusion	8

CITATIONS

Cases:	
Dolcin Corporation v. *Federal Trade Commission*, 219 F. 2d 742, certiorari denied, 348 U.S. 981	6
Johnson v. *Federal Trade Commission*, 266 F. 2d 560	1
Loesch v. *Federal Trade Commission*, 257 F. 2d 882, certiorari denied, 358 U.S. 883	4
Mueller v. *United States*, 262 F. 2d 443	1
United States v. *Thomas Management Corp.*, 1952-53 CCH Trade Cases, Par. 67,251	4
Statute:	
Federal Trade Commission Act, 38 Stat. 717, as amended by 52 Stat. 111, 15 U.S.C. 52, Section 12	2, 3, 5

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 362

WYBRANT SYSTEM PRODUCTS CORPORATION, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 14-15) is reported at 266 F. 2d 571. The opinion and order of the Federal Trade Commission (Pet. 17-24) has not yet been reported.

JURISDICTION

The decision of the Court of Appeals was entered on May 5, 1959, and a petition for rehearing was denied on June 1, 1959 (Pet. 16). The petition for certiorari was filed on August 29, 1959. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Commission found that the petitioners had violated Section 12 of the Federal Trade Commission Act by disseminating false advertisements, in commerce and through the mails, which were likely to induce the purchase of cosmetics in intrastate and interstate commerce. The cosmetics in question are shampoos and lotions sold in connection with a hair treatment system guaranteed to stop abnormal hair loss and grow hair in a majority of the cases of baldness. The questions presented are:

1. Whether the Commission lacked jurisdiction under Section 12 of the Federal Trade Commission Act.

2. Whether the Commission acted within the scope of its permissible discretion in rejecting proffered excerpts from medical treatises.

STATUTE INVOLVED

The pertinent provisions of the Federal Trade Commission Act (38 Stat. 717, as amended by 52 Stat. 114, 15 U.S.C. 52) are as follows:

> Sec. 12(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—
>
> (1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly

the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

STATEMENT

The individual petitioners Adel, William W., and Wade M. Wybrant are engaged, as a partnership doing business as "The Wybrant System", in the business of giving scalp and hair treatments in their several salons in New York City. The partnership had gross receipts of about $460,000 in 1955. The same individuals are the officers and directors of the petitioner, Wybrant System Products Corporation, a New York corporation, which manufactures shampoos and lotions used in its treatment of baldness, and sells them in intrastate and interstate commerce. In 1955, for example, the corporation sold a total of $26,000 worth of lotions, shampoos, devices, or parts of devices used for treating baldness. Of this total, in 1955, about $700 of sales were made in interstate commerce and the remaining $25,000 in intrastate commerce. Petitioners have advertised their system as a cure for baldness and falling hair extensively in New York daily newspapers which circulate in interstate commerce and via the mails.

The Commission issued a complaint on November 21, 1955, charging violation of Section 12 of the Federal Trade Commission Act. A hearing examiner heard witnesses, lay and expert, for both sides. He excluded from consideration, however, petitioners' proffer of excerpts from four medical treatises. At

the close of the hearing, the examiner found petitioners to have disseminated false advertisements in commerce and through the mails which had induced and were likely to induce sales of petitioners' cosmetics in interstate and intrastate commerce (P. App. 17-37).[1] On appeal to the Commission, the initial cease and desist order was unanimously adopted, as modified to grant further relief against petitioners (Pet. 17-24). The Second Circuit affirmed in a one-paragraph *per curiam* opinion (Pet. 14-15).

ARGUMENT

This case, one of a series of decisions rendered against self-styled hair restorers,[2] presents no question warranting review by this Court.

1. Petitioners contend that the advertisements found to be false and misleading related solely to the treatments offered by the Wybrant System partnership and, as such, do not come within Section 12 of the Federal Trade Commission Act which is directed against false advertising related to the sale of "food, drugs, devices, or cosmetics" only. But the hearing examiner (P. App. 23-24), the Commission (Pet. 19), and the Court of Appeals (Pet. 15) all held that

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[1] "P. App." refers to the Appendix to Petitioner's brief in the court below; "F.T.C. App." to that filed below with the brief for the Federal Trade Commission.

[2] See *Mueller* v. *United States*, 262 F. 2d 443 (C.A. 5); *Loesch* v. *Federal Trade Commission*, 257 F. 2d 882 (C.A. 1), certiorari denied, 358 U.S. 883; *Johnson* v. *Federal Trade Commission* 266 F. 2d 560 (C.A. 5); cf. *United States* v. *Thomas Management Corp.*, 1952-53 CCH Trade Cases, Par. 67,251 (N.D. Ill.).

the petitioners' advertising, though in terms directed to the treatments offered by the partnership Wybrant System, clearly was "likely to induce, directly or indirectly, the purchase of [petitioners'] * * * cosmetics.". As the Commission stated (Pet. 19):

> The testimony of many witnesses shows that as a direct result of the advertisements, prospective clients were induced to call at an office of The Wybrant System for treatment of the hair and scalp. It is also shown by the testimony that such persons after becoming clients purchased respondents' preparations for home use. The preparations were in fact sold only to clients or former clients. It is apparent that purchases were induced indirectly as a result of the advertising, regardless of whether the advertisements mention the preparations.

Since the evidence supporting such findings clearly is substantial (see *e.g.*, P. App. 50-51, F.T.C. App. 2-3, 57, 61), and it is not disputed that the advertisements appeared in newspapers which were sent through the mails and also transported in interstate commerce and that a not insubstantial quantity of cosmetics was sold outside of New York State, the false advertising in question fell within the jurisdiction of the Commission under both Sections 12(a)(1) and 12(a)(2). The "important public question" sought to be raised by petitioners as to the alleged extension of Section 12 to cover treatments or other services does not exist.[3]

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[3] The Court of Appeals expressly found that "[n]either the Commission nor the Trial Examiner determined whether

2. Petitioners also contend that the trial examiner, with the subsequent approval of the Commission and the court below, "perpetuate[d] an unsound exclusionary rule of evidence" and "rule[d] that authoritative medical writings are inadmissible as evidence." (Pet. 12). Again, however, it is clear that petitioners' description of the Commission's action cannot be squared with the facts. The examiner refused to permit the introduction into evidence of four treatises (which had already been used to cross-examine the Commission's experts (P. App. 70-71; 77-80; 89-96)) since their authors were not available to stand cross-examination (P. App. 230-233). The Commission, rejected petitioners' claim—which is repeated here—that this exclusion conflicted with the decision in *Dolcin Corporation* v. *Federal Trade Commission*, 219 F. 2d 742 (C.A.D.C.), certiorari denied, 348 U.S. 981. It pointed out that (unlike *Dolcin*) petitioners had not, in the absence of the original authors, sought to introduce the medical treatises by other "experts in the field who will, themselves, be subject to cross-examination." (Pet. 21). Moreover, the Commission, referring to the court's statement in *Dolcin* that an examiner must have broad discretion in allowing or excluding evidence, and that it would hesitate to find that failure to admit testimony, of a type almost uniformly excluded in courts of law, would be prejudicial or deprive the

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the use of preparations in connection with an office treatment [as distinguished from sales "in substantial quantities for home use"] constitutes a sale under § 12 * * *". (Pet. 15).

parties of substantial justice, found no error "[u]nder the circumstances" in the examiner's refusal to admit the scientific writings (Pet. 20-21). The Court of Appeals, noting that the Commission's experts had conceded on examination that some authorities in the field had contrary views, concurred in the view that the refusal to receive the particular documents here was not "reversible error."

In short, the instant case stands solely for the proposition that in a case replete with testimony, lay and expert, the examiner has reasonable discretion to refuse to burden the record with excerpts from treatises, which could not be subject to oral testing and had already been utilized in cross examination to show that there was some conflict of medical opinion on the subject of the prevention and cure of baldness. This determination, held by the court below to involve no reversible error, obviously calls for no further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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FEDERAL TRADE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

The brief in opposition filed by the Federal Trade Commission contains misleading statements of fact which in effect obscure the two serious issues raised by the petition. A short reply, we believe, is in order.

1. Contrary to the impression created by the statement of facts of the Commission's brief, the record in this case does not show a sufficient volume of sales of preparations (i.e., "cosmetics") upon which to base jurisdiction. The brief alleges that since ". . . it is not disputed that the advertisements appeared in news-

papers which were sent through the mails and also transported in interstate commerce and *that a not insubstantial quantity of cosmetics were sold outside of New York State*, the false advertising in question fell within the jurisdiction of the Commission under both Sections 12(a)(1) and 12(a)(2)." (Br. p. 3) (Emphasis added.)

This statement is simply not true. The only specific evidence of the sales of cosmetics—shampoo and lotion—by petitioners was out-of-state sales in the amount of $524 in 1955, $427 in 1954 and $385 in 1953 (R. 48).[1] Thus, in 1955, petitioners' gross receipts were $487,843, while out-of-state sales of preparations were $524. Obviously, no business man doing nearly half a million dollars in annual sales would regularly purchase advertising space in New York City's two largest newspapers for the purpose of selling several hundred dollars worth of preparations.[2] Yet it is on this unreal basis that the Commission seeks to rationalize its assertion of jurisdiction under Section 12.

The important fact is, we repeat, that petitioners' advertisements dealt solely with a hair and scalp treat-

[1] The Commission's brief makes a misleading reference to "about $700 of sales . . . made in interstate commerce" in 1955 (Br. p. 3) but this figure includes such items as steamers, vibrators and other devices not involved in this proceeding. Equally misleading is the reference to total sales of "$26,000 worth of lotions, shampoos, devices or parts of devices," since there is no record evidence showing what portion of these sales constituted preparations or cosmetics—the only products involved here.

[2] Moreover, even as to these few interstate sales of preparations, there is nothing in the record to show that they were made as a result of petitioners' advertisements. Nor is there any basis for such an assumption. The record evidence shows that the incidental sales of preparations in interstate commerce took place under atypical conditions wholly unrelated to petitioners' advertising.

ment. The advertisements made no representations about preparations or any other products, and they were certainly not disseminated for the purpose or with the likelihood of inducing the sale of preparations. In light of these facts, the claim of jurisdiction by the Commission squarely raises the important question of whether Section 12 may be extended to cover advertisements involving solely a treatment or service.

2. On the issue of the admissibility of scientific writings as evidence in administrative proceedings, the Commission seeks to side-step the conflict in opinions by trying to make it appear as if the Hearing Examiner's refusal to admit the proffered treatises turned on the exercise of discretionary authority. This plainly was not the basis of the Examiner's ruling. Whether scientific treatises are authoritative, whether they are out of date, or whether they should be admitted in evidence only through an expert witness, are, of course, matters within the discretionary authority of the Hearing Examiner. In this proceeding, the Examiner did not reach any of these issues, for he flatly decided that selections from scientific writings as such were inadmissible as evidence. To settle all doubts on this point, we have set forth in an appendix the entire ruling of the Hearing Examiner. On appeal, the Commission, following its pre-*Dolcin* practice, endorsed the same exclusionary rule; and this action was approved by the court below.[3]

[3] The Commission's opinion falsely injected the notion of the Examiner's discretion in an attempt to distinguish the *Dolcin* case (Pet. App. C., pp. 20-1). On review, the Court of Appeals confused the issue of the use of medical treatises for evidence and for the purpose of cross-examination. Referring to the cross-examination of medical witnesses with medical treatises, the court stated

We note further that the Commission does not mention the contemporaneous decision in the *Bishop* case, in which the Commission reaffirmed its exclusionary rule for scientific writings. *Matter of Gilbert S. Bishop*, FTC Docket No. 6558 (1958). In *Bishop*, which was decided during the same month as the instant case, the Commission said: "The great weight of authority is that medical books and treatises are not admissible to prove statements therein contained." It then added: "The Commission has consistently followed the rule laid down by a great majority of the courts." The Commission at all times has appeared to be oblivious to the directive of the Court of Appeals in *Dolcin*, as well as the counsel of this Court in *Reilly v. Pinkus*.[1] For this reason, it is not only essential that review be granted to correct the error committed

that "since these witnesses freely conceded that some authorities had expressed somewhat contrary views, we do not think the Trial Examiner's refusal to receive in evidence the medical treatises that petitioners offered constituted reversible error." Pet. App. A, p. 15. There would be merit in this position if the Examiner, in evaluating the medical evidence, had considered the statements in the treatises which contradicted the Commission's experts. The Examiner, however, would *only* consider those statements in the medical writings which *corroborated* or *agreed* with the opinions of the Commission's witnesses. "In the cross-examination of the medical experts," the Examiner said, "each side was allowed to read to the witnesses from the writings of other recognized experts, *but the quotations so read were not considered as evidence unless the witness agreed with them*." R. 27. (Emphasis added.) Thus, the Examiner, while acknowledging the existence of contrary medical opinion, refused to give the statements any weight in evaluating the evidence of the medical experts.

[1] This Court has noted that it is "charged with the duty of reviewing the correctness of the standards which the Commission applies and the essential fairness of the mode by which it reaches its conclusions . . ." *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 81 (1953).

below, but also to settle, once and for all, the question of the admissibility of scientific writings in administrative proceedings.

Respectfully submitted,

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October 1959.

APPENDIX

Portions of the Record Containing the Hearing Examiner's Ruling Relating to the Inadmissibility of Medical Writings*

MR. BODNER [Counsel for Petitioners]: Your Honor, I have certain documents which I would like to have marked for identification. These are excerpts from medical treatises on dermatology, Your Honor.

HEARING EXAMINER CALLAWAY: The next exhibit number will be 34.

MR. BODNER: Respondent's exhibit 34 will be a document of four pages of excerpts from a book entitled "Diseases of the Skin," by Oliver S. Ormsby and Hamilton Montgomery, and that is the 8th edition, published in 1954.

HEARING EXAMINER CALLAWAY: All right, it will be marked.

(The document referred to above was marked Respondent's exhibit 34 for identification.)

MR. BODNER: Now as Exhibit Number 35, there are three pages of excerpts from a book entitled "Practical Dermatology," by George M. Lewis, and the book was published in 1952.

HEARING EXAMINER CALLAWAY: All right. It will be marked Respondent's exhibit 36 for identification.

(The document referred to above was marked Respondent's exhibit 35 for identification.)

MR. BODNER: As Exhibit Number 36 there are three pages of excerpts from a book entitled "The Hair and the Scalp," by Agnes Savill. That is the 4th edition, published in 1952.

HEARING EXAMINER CALLAWAY: All right. It will be marked Respondent's exhibit 36 for identification.

(The document referred to above was marked Respondent's exhibit 36 for identification.)

MR. BODNER: As exhibit number 37, an eight page excerpt from a book entitled "Your Hair and Its Care," by Oscar

* Printed on the Appendix in the court below, at pp. 230-33.

L. Levin and Howard T. Behrman and that is a 1947 edition.

HEARING EXAMINER CALLAWAY: All right. Let that be marked Respondent's exhibit 37 for identification.

(Whereupon, the document referred to above was marked Respondent's exhibit 37 for identification.)

MR. BODNER: Your Honor, all these excerpts in Respondent's exhibits 34, 35, 36 and 37 are taken from books on dermatology which have been written by well recognized authorities. In fact, the Commission's own doctors that were presented in this case have recognized these writers as authoritative and of high reputation. And we wish to offer as Respondent's 34, 35, 36, and 37 these documents into evidence.

HEARING EXAMINER CALLAWAY: Mr. Bodner, I can't accept them in evidence. I think you would have to bring the authors of them in and let them be subject to cross examination.

MR. BODNER: Your Honor, I recognize that that is a standard objection in the case of so called hearsay evidence, but I believe there is a great deal of authority to support the proposition that this evidence should be admitted in administrative proceedings.

HEARING EXAMINER CALLAWAY: Now Mr. Bodner, as an example of the frailty of that as evidence, you have offered as Respondent's exhibit 37 an eight page excerpt from "Your Hair and Its Care," by Doctors Levin and Behrman, and as I stated in Chicago, I know personally that Doctor Behrman, one of the authors of that book, did not now hold to some of the views expressed therein. So that is just evidence of the frailty of that kind of testimony and I just can't accept it.

MR. BODNER: Your Honor, speaking of the Behrman book, if there are any quotations which we have taken from the 1947 book which are inconsistent with any expressions of opinion by him at a later date, I am sure that matter will be brought to Your Honor's attention by counsel in support of the complaint.

HEARING EXAMINER CALLAWAY: I am just using that as an illustration of the frailty of that type of testimony and as to why I cannot accept it.

MR. BODNER: Before Your Honor finally rules on this, I have prepared a legal argument on the authorities in support of the proposition that such evidence should be admitted and I would like to present that to Your Honor.

HEARING EXAMINER CALLAWAY: Well, you can present it by way of brief if you want to. I don't think it ought to go on the record. You stated your position on it, and under our rules argument should not be on the record, although that has been violated a good deal in this case, I will admit, but that is contrary to the Commission's practice.

I will hear you off the record, understand, if you want me to.

MR. BODNER: Well, I would like at least the citations to the leading authorities to go on the record, if that is all right with you.

HEARING EXAMINER CALLAWAY: No, that is a matter you can argue in brief, the citations as to the authorities, just like the other argument. Now if you desire to make an argument on it at this time, I will be glad to hear you. We will go off the record.

MR. HOWREY (Counsel for petitioners): May I be heard on this question?

HEARING EXAMINER CALLAWAY: Yes, sir.

MR. HOWREY: Mr. Bodner has prepared from leading cases a great deal of authority and the only purpose of making it would be to put it on the record so we could have it on appeal. We don't for a minute think we are going to change Your Honor's mind but we feel confident that somewhere along the line someone will agree with us, whether it is the Commission or the courts, and if we don't have it in the record, we won't have a record of it.

I thought the purpose of the record was to have these rules and the argument on both sides so we could take the question up on appeal. We are confident that this is a proper exception to the hearsay rule.

HEARING EXAMINER CALLAWAY: Well, Mr. Howrey, you have the offer, you have the statement that you think that these proposed exhibits that are marked for identification are competent evidence. Now on appeal you can make in your brief any argument that you might want to make, cite any authorities, but under the practice in hearings before Hearing Examiners, the arguments and citations of authority should not be a matter of record. You can bring those forth in your brief on appeal.

MR. HOWREY: Well, I think then we will just—we want the record to show that we have offered legal authorities and precedents in support of our position and we feel it would be a waste of time to make an off the record argument because we don't see any purpose in making any argument off the record at any time in any hearing.

HEARING EXAMINER CALLAWAY: All right. The record shows that.